In the result there will be judgment for the plaintiff for $15,000 with interest at 6% from date of judgment to date of realisation, judgment for $320 for special damages and the cost of this action.

Order accordingly.

Solicitors: *Atma Singh Gill; Cheang Lee & Ong.*

MEENACHI SUNDARAM v. MALAYAN BANKING LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) September 18, 1967]

[Ipoh — Federal Court Civil Appeal No. X. 12 of 1967]

Practice and Procedure — Whether order of court when once perfected and entered can be amended after a lapse of a year.

In certain proceedings brought by the bank against an executor of an estate, the appellant herein, to recover moneys secured by charges against lands belonging to the estate, charged by the executor, a certain order was made by the learned judge pursuant to agreement reached between counsel for the parties. An order was drawn by counsel for the executor, its draft having been approved with certain amendments by counsel for the bank, was finally perfected and entered in the book in the registry. After about a year later, counsel for the executor made an application to have the order amended by restoring the word "personally", which was struck out by counsel for the bank when in its draft form, on the ground that there had been an accidental slip or omission. The learned judge held that there was no accidental slip or omission as the omission of the word "personally" was made intentionally with the knowledge and acquiescence of counsel for the executor and dismissed the application. On appeal:

Held: it was a simple question of fact whether or not there was a slip, and therefore there was no reason to disagree with the learned judge.

Case referred to:—

(1) *Farhall* v. *Farhall* (1871-2), L.R. 7 Ch. App. 123.

FEDERAL COURT.

N. Sharma for the appellant.

Lim Kean Chye and *A. S. Yeo* for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Ipoh, dismissing the appellant's application that the order of the court dated 14th February 1966 be amended by adding the word "personally" to paragraph 2 of the order so that that paragraph would read as follows:—

"It is ordered, that the originating summons (Enclosure 2) be and is hereby struck out but without prejudice to the rights of the chargee/applicants to file fresh proceedings against the respondent personally."

It is I think necessary to refer to the facts of the case.

The appellant, an executor of the last will of one Veerasamy dece sed, and as such, executed several charges against certain lands belonging to the estate in favour of the respondent for the purpose of securing an overdraft allowed by the respondent, amounting to $812,752.02.

In November 1964, the respondent through their solicitors served a notice on the appellant demanding payment of the said sum. When the appellant failed to comply with the notice the respondent took out an originating summons (No. 766 of 1964) calling upon the appellant to show cause why the said lands should not be auctioned.

On 4th October 1965, the respondent obtained the order of the court ordering among other things that the said land be sold by public auction.

On 3rd January 1966, however, before the lands could be auctioned the appellant took out a summons to have the order of the 4th October set aside on the ground *inter alia* that (a) he, the appellant had no authority to charge the lands as they formed a part of the estate of the deceased and (b) that no notice in accordance with the provision of section 138 of the Land Code had been served on him.

On 14th February 1966 the above summons came before MacIntyre J.

By consent of both Mr. Yeo for the respondent and Mr. Sharma for the appellant the learned judge made an order striking out the originating summons No. 766 of 1964 but without prejudice to the right of the respondent to file fresh proceedings against the appellant. At the same time Mr. Sharma for the appellant withdrew his application to have the originating summons struck out.

The judge's notes of this proceeding read as follows:—

"Yeo now says he wishes to withdraw the originating summons altogether without prejudice to his client's right to institute action against Meenachi Sundaram personally.

Sharma withdrew summons in chambers enclosure 18. No order as to costs."

Subsequently Mr. Sharma put up a draft order which reads as follows:—

"It is ordered that the originating summons (Enclosure 2) be and is hereby struck out but without prejudice to the right of the chargee/applicants to file fresh proceedings against Meenachi Sundaram personally."

But when the draft was sent to Mr. Yeo he amended it by striking out the words "Meenachi Sundaram personally" and substituting therefor the words "the respondent." The draft order as amended by Mr. Yeo was apparently sent back to Mr. Sharma and it was subsequently entered in the book in the Registry.

It was not until about a year later, that is, on the 2nd February 1967, that Mr. Sharma took out a summons to have the order amended by restoring the word "personally" to the second paragraph on the ground that there has been an accidental slip or omission.

Mr. Sharma in his affidavit maintained that it was the agreement of both parties that the respondent would be at liberty to file proceedings against the appellant personally only and not as a representative.

The matter came before the same judge MacIntyre J. who, however, after reading the affidavits and hearing arguments held that this was not a case of an accidental slip or omission, as the omission of the word "personally" was made intentionally with the knowledge and acquiescence of Mr. Sharma. The learned judge was satisfied that the order as finally perfected and entered in the book was in conformity with what both counsel intended it to be, and that what Mr. Yeo stated before him in chambers in the first instance as to confining any future claim against the chargor "personally" was a slip of the tongue and for that reason he dismissed Mr. Sharma's application.

I see no reason why I should disagree with MacIntyre J. and I would therefore dismiss this appeal with costs.

Ong Hock Thye F.J.: On October 4, 1965 the respondent, chargee of certain lands, obtained an order *ex parte* for the sale of those lands, over which a charge had been executed by the appellant, as legal representative of the estate of the deceased proprietor.

On January 27, 1966 the appellant chargor applied, by way of Summons in Chambers, to set aside the order of sale "on such terms as the court considers just." It was also suggested that, as the matter involved "intricate questions of law", proceedings by way of originating summons should be stayed and that the chargee "be ordered to file a suit" instead.

On February 14, 1966 Mr. N. Sharma and Mr. A. S. Yeo appeared before the judge in chambers as counsel for the chargor and chargee respectively. What in effect took place then was that Mr. Yeo withdrew his originating summons and Mr. Sharma in return withdrew his summons to set aside the order of sale and no order was made as to costs on either side.

It was clearly an order by consent that was asked for and made in chambers by the judge. The order drawn by Mr. Sharma himself was as follows, to quote only the relevant portion:—

"*AND UPON HEARING* the counsel for the parties *AND BY CONSENT:*

IT IS ORDERED that the originating summons (Enclosure 2) be and is hereby struck out but without prejudice to the right of the chargee/applicants to file fresh proceedings against Meenachi Sundaram personally."

The last three words in the draft order were struck out by Mr. Yeo and in their place he inserted "the respondent". As so amended fair copies of the order were sent by Mr. Sharma to the Senior Assistant Registrar and in that form duly perfected and issued.

Almost a year later, after the chargee had commenced fresh proceedings against the chargor, Mr. Sharma took out an application to amend the order of February 14, 1966 by adding the word "personally" after the word "respondent". I fail to see how any useful purpose can be served, even if the application had been allowed. The nature of an executor's liability is clear: see *Farhall* v. *Farhall.*[1] But, assuming that the application had some other object, which is not apparent at this stage, that is the very reason for disallowing the amendment since the object is not disclosed with complete candour to this court.

In his affidavit Mr. Sharma explained that there had been "an accidental slip or omission." The learned judge, however, took the view that there was "no question of an accidental slip or omission" and, with respect, I agree. There was some controversy as to what Mr. Yeo actually said in chambers but, bearing in mind the accepted practice in cases where counsel on both sides are asking for an order by consent, the precise terms of which are left to be settled between themselves, as a matter of course, it seems to me that Mr. Sharma cannot be heard to plead his own negligence, as he has attempted to do. Had he not been in complete agreement with the amendments made by Mr. Yeo, why did he fail to have the minutes of the order settled by the judge before perfecting the order?

In my judgment, there was no accidental slip or omission, nor even any negligence, though avowed.

In any event the withdrawal of the originating summons was allowed on terms which the judge, even on second thoughts, considered to have been fairly and accurately set down in the consent order and which he saw no reason to revise.

It was a simple question of fact whether or not there was a slip. As I am in full agreement with MacIntyre J., I consider it otiose to cite authorities in support of my judgment. I would dismiss this appeal with costs.

Barakbah L.P. concurred.

Appeal dismissed.

Solicitors: *N. Sharma; A. S. Yeo.*